APR 1937
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 753 OCTOBER TERM, 1936

AETNA INSURANCE COMPANY,
Petitioner,

vs.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

No. 754 OCTOBER TERM, 1936

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY,
Petitioner,

vs.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

No. 755 OCTOBER TERM, 1936

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED,
Petitioner,

vs.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

RESPONDENT'S BRIEF ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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SUPPLEMENT TO PETITIONERS' STATEMENT OF THE CASE

In addition to the provisions of the policies recited in petitioners' Statement of the Case (Petitioners' Brief, pp. 2-5), each policy also contained the following union mortgagee clause:

> "Loss or damage, if any, under this Policy, shall be payable to John M. Kennedy, 3rd, as mortgagee, (or trustee) as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within-described property * * *"

(Plaintiff's Exhibit 1, Rec. p. 40; Plaintiff's Exhibit 2, Rec. p. 53; Plaintiff's Exhibit 3, Rec. p. 63.)

SUMMARY OF ARGUMENT

1. Kennedy's separate contracts of insurance were not cancelled.

2. The direction of judgments was substantially and sufficiently in conformity with state practice.

3. Petitioners waived a trial by jury.

4. The order of the Circuit Court did not violate the Seventh Amendment.

ARGUMENT

I.

KENNEDY'S SEPARATE CONTRACTS OF INSURANCE WERE NOT CANCELLED

The effect of the union mortgagee clauses recited above was the creation of a contract of insurance between the insurance companies and the mortgagee, entirely separate and distinct from the contract beetween the insurance companies and the assured. *Queen Ins. Co. v. Peoples Union Savings Bank* (C. C. A. 3d) 50 F. (2d) 63.

Under the terms of the policies, the insurance companies could have cancelled Kennedy's interest in the policies on ten days' notice. Concededly, no notice of any kind was given, and therefore it may not be said that there was any cancellation of Kennedy's interest by the method provided for in the policies. Nor may it be said that the cancellation by the bank of its interest in the policies resulted in the cancellation of Kennedy's interest. Kennedy's interest arose out of a separate contract of insurance created by the union mortgagee clause and this interest could not be diminished or destroyed by any agreement between the insurance companies and the bank.

As above noted the policies specifically provide (Plaintiff's Ex. No. 1, Rec., p. 40; Plaintiff's Ex. No. 2, Rec., p. 53; Plaintiff's Ex. No. 3, Rec., p. 63) that

> "The interest of the mortgagee • • • shall not be invalidated by any act • • • of the mortgagor or owner • • •"

Certainly the cancellation by the bank of its interest in the policies was an act within the scope and purpose of the clause quoted.

In *3 Joyce on Insurance*, para. 1668, it is said that

> "Notice to the mortgagee is a prerequisite to cancellation under a standard policy containing a mortgagee

clause and providing that it may be cancelled at any time at assured's request where it is also provided that no act or default of any person other than the mortgagee or his agent shall affect his right to recover in case of loss,"

and that

"Notice to one of several holding an interest under the policy is insufficient."

The only other method, therefore, whereby Kennedy's separate contracts of insurance could have been rescinded, was by mutual agreement between Kennedy and the insurance companies. This requires, however, Kennedy's consent and as in every other agreement, the consent must be mutual, i. e., there must be a meeting of the minds.

The conduct and language upon which defendants rely to establish Kennedy's consent is contained in the testimony of Nochem S. Winnett, Esq., the attorney for the bank, who was called as a witness by the defendants. The relevant portions of his testimony are contained in full in the Opinion of the Circuit Court, at Record pages 158 to 161 inclusive, and are therefore not repeated here.

It is respectfully submitted that that testimony does not establish Kennedy's consent.

Reading it in a light most favorable to defendants, it shows that Kennedy was advised of the intention of the bank to surrender the policies at some indeterminate future date; that Kennedy knew or should have known, if they did so that his separate contracts of insurance might be cancelled by the companies on ten days' notice and that thereafter perhaps he intended to be without insurance. Until the lapse of the ten days, however, his policies, under their terms, were in full force and effect; and he said nothing about relinquishing his right to notice if the company decided to cancel his separate contracts pursuant to the ten day notice clause.

In this connection it is important to note that Winnett, the agent of the bank, to whom Kennedy is supposed to have

expressed his consent, did not know (and Kennedy also did not know), after the fire whether the policies had been cancelled; and yet defendants contend that it was to Winnett that Kennedy expressed his consent to the cancellation (Rec., p. 113). Certainly, defendants failed to establish an expressed consent and, as a matter of fact, the defendants' witness Winnett, admitted that Kennedy did not acquiesce in or authorize the cancellation of the policies (Rec. pp. 111, 112).

In 12 C. J. 518, "Consent" is defined as follows:

> "Consent, in law, is not a vacant or neutral attitude, and implies something more than a mere acquiescence in a state of things already in existence, or a mere formal act of the mind; it is affirmative in its nature, implying some positive action * * *."

The burden of proving such "consent" rests, of course, on the defendants who raised the defense of cancellation.

As stated in 26 C. J. 515:

> "Where defendant alleges that the contract or policy had been cancelled, the burden is on it of proving cancellation, and incidentally of proving its compliance with conditions precedent to the right to cancel."

See also *3 Joyce on Insurance*, 2848, and cases cited.

Respondent maintains, therefore, that not only did defendants fail to meet this burden but that the evidence clearly establishes that plaintiff did not consent.

It should be noted that petitioners' argument that the contracts were mutually rescinded is based on the unfounded assumption that Winnet was Kennedy's agent. It is submitted that the record is clear that Winnet was not Kennedy's agent, and acted not for him, but for the bank, whose interests here were adverse and hostile to those of Kennedy.

Respondent further contends that even if it be assumed (although it is in fact denied) that Kennedy consented to the cancellation of the policies, the consent, not being communicated to the defendants, could not result in a mutual

agreement of rescission. There is not a word of testimony in the record to show that the alleged consent of Kennedy was communicated to the defendants, or that they had any knowledge whatever of the conversation between Winnet and Kennedy relied on by defendants to establish Kennedy's consent. Likewise and conversely there is no evidence whatsoever to show that defendants notified Kennedy of the transaction wherein they accepted the policies from the second mortgagee and returned the unearned premiums.

Inasmuch as there was no communication between defendants and Kennedy, there could not be that meeting of the minds requisite for mutual rescission.

As stated in *3 Joyce on Insurance*, sec. 1634, pp. 2765-66:

> "It is necessary in cases of rescission or cancellation by agreement that there be a complete contract or meeting of minds, otherwise the agreement will not stand."

And in *Waters v. Annuity Co.*, 144 N. C. 663, 672:

> "A contract of insurance may be set aside by mutual consent, the consent of one of the parties being respectfully the consideration for the consent of the other. But where, as here, this is the sole consideration claimed, in order to make a binding agreement there is required the essential element in the law of this and all other contracts—that of mutuality."

In *Sea Ins. Co. vs. Johnston*, 105 Fed. 286, 291, it is said:

> "Such, unquestionably, is the effect of the acceptance by the insured of the proposition of rescission if the acceptance is unqualified. The minds of the contracting parties must meet in this case as in that of other contracts."

And in 13 C. J. 601:

> "If one party to a contract furnishes a legal ground for rescission, his assent to a rescission declared by the other is unnecessary, but in the absence of such ground all the parties to the contract must assent to its rescission and there must be a meeting of their minds. Hence

one party to a contract cannot rescind it by merely giving notice to the other of its intention to do so; the offer on the one side must be accepted on the other, such offer and acceptance being governed by the same rules as govern the inception of contracts generally, as, for example, when the offer is made by mail."

See also, *Thompson v. Stone*, 43 Pa. Sup. 69.

As stated above, there is no evidence whatever to show that the alleged consent of Kennedy to the cancellation of the policies was ever communicated to the defendants, or that they, in turn, notified him of their acceptance of the policies from the second mortgagee, and the subsequent return of the unearned premiums. On the other hand, all the evidence shows that the insurance companies mistakenly believed that Kennedy, despite the mortgagee clause, had no interest in the policies; that it was therefore unnecessary to obtain his consent to, or give him notice of, cancellation of the policies; and that they therefore dealt solely with the bank, to the entire exclusion of Kennedy, in their negotiations with respect to cancellation of the policies. Under these facts, we respectfully submit that the interest of the mortgagee in the said policies was not cancelled but remained in full force and effect.

II.

THE DIRECTION OF JUDGMENTS WAS SUBSTANTIALLY AND SUFFICIENTLY IN CONFORMITY WITH STATE PRACTICE

Petitioners argue that the order of the Circuit Court remanding the causes for the entry of judgments *n. o. v.* was invalid, because respondent had not requested the Trial Judge, after the verdict, to enter such judgments.

This practice, which exists in our state courts, does not, however, exist in the federal courts in this Commonwealth, and has not existed since the decision of this Court in *Slocum v. N. Y. Life Ins. Co.*, 228 U. S. 364, in 1913. The discontinuance of the practice which had theretofore existed

was due to the general and unquestioned impression that the *Slocum* case held that the entry of such judgments, under any circumstances, violated the Seventh Amendment. So prevalent and unshakeable was this impression that even subsequent to the decision in 1935 in *Baltimore & Carolina Line, Inc. v. Redman*, 295 U. S. 654, it was said, in a case arising in a District Court in the state:

> "Under the decision in Slocum v. New York Life Insurance Co. (1913) 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029, I cannot consider the motion for judgment non obstante veredicto as such, but shall dispose of the point raised by that motion in deciding whether defendants' request for binding instructions shall have been granted. This I consider to be in conformity with the procedure sanctioned by the Supreme Court in Baltimore & Carolina Line, Inc. v. Redman (1935) 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636."
>
> *Penn Anthracite Mining Co. v. Dela. & H. R. Corp.*, (D. C. M. D. Pa. 1936) 16 F. Supp. 732, 734.

The instant causes were tried in April, 1934. Respondent's counsel, after the verdict, filed a motion for a new trial alleging as error, *inter alia*, the refusal of the trial Judge to affirm plaintiff's point for binding instructions, but did not, for the reasons stated, file a motion for judgments *n. o. v.* Before the appeal to the Circuit Court was argued however, the *Redman* case was decided; and thereupon respondent's counsel moved the court, both in the printed briefs and at the oral argument, to enter judgments *n. o. v.*

The state statute providing for judgments *n. o. v.* is as follows:

> "Whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may within the time prescribed for moving for a new trial, or within such other or future time as the court shall allow, move the court to have all the evidence taken upon the trial

duly certified and filed so as to become part of the record, and for judgment non obstante veredicto upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the court in that regard. From the judgment thus entered either party may appeal to the Supreme or Superior Court, as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court."

ACT OF APRIL 22, 1905, P. L. 286, as amended April 9, 1925, P. L. 221 (12 Purdon's Penna. Statutes Annotated, Sec. 681.)

It is apparent that the act contemplates two procedural conditions precedent to the granting of the judgments: *first*, that the motion for a directed verdict shall be made at the trial, and reserved or declined, and the question thereafter preserved; and *secondly*, that the evidence shall be certified and filed so as to become part of the record. Both conditions are here present. Respondent requested binding instructions; the Court, in declining, granted an exception to its ruling; and the evidence was certified and filed (Rec. pp. 127, 129, 132, 137).

Hence there was substantial and sufficient compliance with the provisions of the act which, since it deals with the review of judgments, is advisory and not mandatory: *Indianapolis & St. Louis RR. Co. v. Horst*, 93 U. S. 291; *Hein v. Westinghouse Airbrake Co.*, 168 F. 766; *Cudahy Packing Co. v. City of Omaha*, 24 F. (2d) 3; *Associated Mfg. Corp. v. DeJong*, 64 F. (2d) 64.

Certainly the order directing the entry of judgments for plaintiff complied with the Circuit Court's duty to "give judgment after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the

parties". Judicial Code, Sect. 269, as amended, 28 U. S. C., Sect. 391; *Camp v. Gress*, 250 U. S. 308; *Southern Oil Corp. v. Waggoner*, 276 F. 487."

III.

PETITIONERS WAIVED A TRIAL BY JURY.

The Circuit Court found there were no factual contradictions in the evidence, and that both parties assumed this to be true by requesting peremptory instructions (Rec. p. 162).

Petitioners contend, however, since both parties submitted other points for charge, that the case comes within the scope of the exception to the rule enunciated in *Bank of Union v. Fidelity & Casualty Co., of N. Y.* (C. C. A. 8th) 62 F. (2d), 1040, 1041, as follows:

> "Ordinarily, where both parties move for a directed verdict with reservations, it amounts to a waiver of a jury trial, and a submission to the court of questions of fact as well as of law. Beutell v. Magone, 157 U. S. 154, 15 S. Ct. 566, 39 L. Ed. 654; Williams v. Vreeland, 250 U. S. 295, 39 S. Ct. 438, 63 L. Ed. 989, 3 A. L. R. 1038. But, where a party makes such motion, and at the same time requests instructions to the jury which show he does not intend to waive his right to jury trial if his motion is overruled, he cannot be held to have waived a trial by jury of the *fact questions*." (Italics ours.)

Certainly petitioners did not expressly reserve their rights against waiver: *Sampliner v. Motion Picture Patents Co.*, 254 U. S. 233; *Union Indemnity Co. v. U. S.*, 74 F. (2d) 645. Respondent submits, moreover, *first*, that there were no *"fact questions"*; *secondly*, that since there were none, mere requests for instructions could not create them; and *thirdly* and finally, that all the instructions requested by both parties dealt with the single legal question of whether the policies were in force as to Kennedy at the time of the fire (Rec. pp. 127, 131).

IV.

THE ORDER OF THE CIRCUIT COURT DID NOT VIOLATE THE SEVENTH AMENDMENT

In reversing the judgments, the Circuit Court said (Rec. p. 162):

> "• • • the evidence will not sustain the verdict for the defendant. We did not go quite far enough when the case was here before. Under the authority of Baltimore & Carolina Line, Inc. v. Redman, 295 U. S. 654 and Kaeppel v. Mutual Life Insurance Company of New York, 78 Fed. (2d) 899, the petition for rehearing is denied and the case remanded to the District Court with directions to enter judgment for the plaintiff for $11,000.00 with interest thereon from March 25, 1932, the amount counsel agreed to be due the plaintiff if she is entitled to a judgment."

Petitioners argue that since the verdict was not taken subject to the reservation of a point for binding instructions, the *Slocum* case, and not the *Redman* case, controls.

Respondent respectfully submits that there is no foundation whatever in reason or logic for the distinction between declining and reserving a point requesting binding instructions. Actually the difference is one only of practice: *e. g.*, in New York the verdicts are taken subject to the reservation of decision on the motion, and the motion subsequently determined as in the *Redman* case; and in Pennsylvania the motion is affirmed or denied, the verdict taken, and the motion thereafter re-examined and determined on a motion for judgment *n. o. v.* as in the *Slocum* case. Hence it is not too much to say that if the *Redman* case had been tried in Pennsylvania there would have been no reservation of the point, and consequently, if the *Slocum* case is still controlling law, the appellate court would have lacked power to enter judgment *n. o. v.*, although the procedural codes and practice in both states authorize such judgments whenever the ends of justice require them.

The lack of real distinction between the situations has long been recognized in Pennsylvania by the act hereinabove quoted, which authorizes such judgments whenever the point has been "reserved or declined". More recently, the unreality of the alleged difference has been recognized by this Court's Advisory Committee on Rules for Civil Procedure, who recommended the following rule:

> "*Rule 56: Motion for a directed verdict* • • •
>
> Whenever a motion for a directed verdict made at the close of all the evidence is not granted, the court shall be deemed to have reserved decision thereon and to have taken the verdict subject to a later determination of the questions involved • • •." (Preliminary Draft of Rules, etc., May, 1936, p. 101.)

It should also be noted that the learned Trial Judge granted an exception to his ruling declining plaintiff's motion for a directed verdict and thereby preserved the question for review thereafter (Rec. p. 127). It follows, therefore, since the court has a plenary power during the term to modify, revoke or reverse its judgments (*Bronson v. Schullen*, 104 U. S. 210; *Zimmern v. U. S.*, 298 U. S. 167), that the instant cause comes within the *rationale*, if not the letter, of the *Redman* case.

Respondent urges, in conclusion, that the Seventh Amendment was not violated because there were no contradictions in the evidence, and the single issue involved was legal and not factual. That issue admittedly was whether Kennedy had consented to the cancellation of his separate policies of insurance. The Circuit Court held that there was not sufficient evidence to go to the jury on that question.

In the *Redman* case, Mr. Justice Van Devanter said, at pages 657, 659:

> "The aim of the amendment • • • is to preserve the substance of the common law right of a trial by jury • • • whereby • • • issues of law are to be resolved by the court, and issues of fact are to be determined by the jury • • •.

> • • • defendants' [motion] • • • for a directed verdict • • • [was] based on the asserted insufficiency of the evidence to support a verdict for the plaintiff. Whether the evidence was sufficient or otherwise was a question of law to be resolved by the Court."

In the *Slocum* case, in language altogether applicable to the pattern and issue of the present cause, the present Chief Justice, in a dissenting opinion in which three other justices concurred, said, *inter alia*, at pages 400, 401:

> "What, then, is this case? It was an action upon a policy of insurance. It was triable by jury, but the province of the jury was to decide questions of fact, not questions of law. This court concludes, as did the Court of Appeals, that 'the evidence did not admit of a finding that the policy was in force at the time of the insured's death'. In other words, after the plaintiff had had full opportunity to present her case and to show facts for the consideration of the jury, and the case on both sides had been closed, it appeared that there were no facts whatever upon which the jury would be warranted in finding a verdict in her favor. Hence, says this court, the defendant was entitled to a direction of a verdict in its favor, as it requested. Had the trial court rightly applied the law, the case would properly have ended in a final judgment for the defendant. But the trial court erred in the law, and consequently the jury found a verdict for the plaintiff—not upon facts but without any facts upon which they could rest it. Now it is said that a statute which permits the trial court or the appellate court, after that wrongful verdict, to correct the error, and in so doing not only to set aside the verdict but to direct the entry of the judgment to which the defendant in law was entitled is, as applied to a case in the Federal court, contrary to the Constitution.
>
> The Seventh Amendment provides that 'no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law'. But, wherein has any matter of fact tried by a jury been re-examined? Concededly, there was no fact to be tried by a jury; the case as made was barren of any such fact; and there being none, there

has been no re-examination of it. How can it be said that the Circuit Court of Appeals has determined the facts or has passed upon issues of fact? Whether there was any evidence for the jury was a question of law. The trial court, in wrongly deciding it, did not convert it into a question of fact; it was not altered by the verdict, but remained the same in its nature—a question for the determination of the court."

Respondent respectfully suggests that if the *Slocum* case be read in the light of the foregoing quotations from the *Redman* case, its dissenting opinion, and not its majority decision, is today law. If, however, that decision is still an impassable barrier to the power of a federal court to enter judgment *n. o. v.* in a case where the only question is the sufficiency of the evidence, then it is urged that the decision requires re-examination and present modification by the adoption herein of its dissenting opinion.

All of which is respectfully submitted.

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Attorney for Defendant.